Supreme Court, U. S.
FILED
JUN 1 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1977
No. 77-1629

No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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Contained herein are reproductions of documents comprising the Appendices to the Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One, in the within action.

NOT FOR PUBLICATION IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WAYMAN O. WILKES, Defendant and Appellant.	2 Crim. No. 27380 (Super. Ct. No. A 308468)

COURT OF APPEAL-SECOND DIST.
FILED
NOV 18 1977
CLAY ROBBINS, JR. Clerk
Deputy Clerk

Appeal from a judgment of the Superior Court of Los Angeles County. Thomas T. Johnson, Judge. Affirmed.

Rosen and Chalfin, and Frank P. Rosen, for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Lawrence P. Scherb II and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX A

In an indictment, defendant Wilkes and others (including Ronald Silverton) were accused in count 1 of conspiracy to commit several felonies and misdemeanors (including attempt to sell a person or persons in violation of section 181 of the Penal Code, and soliciting children for adoption in violation of section 224p of the Civil Code.) In other counts (8, 9, 10, 14) defendant Wilkes was accused of misdemeanors (placing children for adoption without a valid license therefor). He admitted allegations of the indictment that he had been convicted of eleven felonies.

After denial of various motions (to set aside indictment, to suppress evidence, and for separate trials), Wilkes, who was represented by counsel (other than present counsel), withdrew his plea of not guilty and pleaded guilty to conspiracy to commit the misdemeanors alleged in count 1. The allegations that he conspired to commit the felonies were deleted from count 1. Probation was granted; and the other counts (8, 9, 10, 14) were dismissed as to him. After his plea of guilty and prior to sentencing, he testified at the trial of a codefendant Silverton. That trial was before the same judge who, at a later time, sentenced Wilkes. His

motion for issuance of a certificate of probable cause was denied.

Upon Wilkes' appeal from the judgment (order granting probation) entered on his plea of guilty, he contends that at the time he testified at the trial of codefendant Silverton, the court erred in not advising him of his right to counsel, or of his privilege against self-incrimination.

The People contend that the appeal should be dismissed because defendant did not obtain a certificate of probable cause pursuant to section 1237.5 of the Penal Code (citing People v. Meals, 49 Cal.App.3d 702, 708 [122 Cal.Rptr. 585].)

In People v. Kaanehe, 19 Cal.3d 1, 7-9 [_____ Cal.Rptr. _____, _____ P.2d _____], there were statements as to issues that properly may be raised on appeal where there has not been compliance with said section 1237.5. It was said therein (p. 8) that search and seizure issues may be raised on such appeal as an exception to section 1237.5, and that the section does not apply "where a defendant does not challenge the original validity of the plea but asserts that errors were committed in proceedings subsequent to the plea for

the purpose of determining the penalty to be imposed." It was also said therein (p. 9): "Other than search and seizure issues which are specifically made reviewable by section 1538.5, subdivision (m), all errors arising prior to entry of a guilty plea are waived, except those which question the jurisdiction or legality of the proceedings resulting in the plea."

Where a plea of guilty is entered as a result of plea bargain, and the judgment entered is contrary to the promise giving rise to the plea or where the state has failed to perform its part of the bargain, the trial court may allow withdrawal of the plea. (People v. Barteau, 10 Cal.App.3d 483, 486 [89 Cal.Rptr. 139]; see People v. Delles, 69 Cal.2d 906, 910-911 [73 Cal.Rptr. 389, 447 P.2d 629].) Whether the trial court allows withdrawal of a plea of guilty is directed to the trial court's discretion. (People v. Barteau, supra, p. 486.)

In the present case the defendant's plea of guilty was entered pursuant to plea bargain; however, he did not make a motion in the trial court to withdraw the plea. His brief on appeal does not claim any violation of the plea bargain. He has not presented an argument as to withdrawal of the plea. As above stated, his contention

on appeal is that the judge in the Silverton trial, wherein defendant was a witness (called by People), erred in not advising defendant, prior to his testifying therein, of his right to counsel, or of his privilege against self-incrimination.

Appellant argues that although "the Silverton trial was collateral to his own proceedings," the two proceedings arose out of the same indictment; "both were held before the same trial court"; and because defendant (at the time of testifying at Silverton trial) had not been sentenced on his plea, he "would be placed in a position of jeopardy by being either forced to incriminate himself on the remaining charges [counts 8, 9, 10, 14] or be in a position . . . of incredibility with the trial court, thereby influencing the trial court on the question of sentencing which was still remaining." He also asserts that while he was testifying at the Silverton trial, the judge made comments to the effect that defendant's testimony would affect the judge's subsequent determination of sentence to be imposed upon defendant.

The record shows that the plea bargain (made when defendant was represented by counsel), was, in substance, that defendant would plead guilty to count 1

pursuant to agreement that the allegations of conspiracy to commit the felonies would be deleted and the allegation of conspiring to commit the misdemeanors would remain; he would be placed on probation for a period of time to be determined by the trial court; as a condition of probation, he might be sentenced to county jail for a period of up to one year; if he violated probation, he could be sentenced to prison for the term prescribed by law on the offense to which he pleaded guilty; entry of the plea could possibly result in revocation of his parole in a federal case wherein he had been sentenced previously; and the People would dismiss the other charges (counts 8, 9, 10, 14) pending against him in the instant case.

After defendant pleaded guilty, the court ordered him to cooperate if called as a witness in the Silverton trial; and he said that he would cooperate. He testified at the Silverton trial on February 18, 1975.

About two months thereafter (April 29, 1975) he was sentenced on count 1 herein -- he was granted probation for three years on certain conditions, including a condition that he spend the first nine months in county jail; and, upon motion by the People, the remaining counts (8, 9, 10, 14) were dismissed.

Appellant does not assert that the sentence imposed was contrary to the plea bargain. His assertion to the effect that his testimony at the Silverton trial was prejudicial to him with respect to the remaining counts (8, 9, 10, 14), because those counts had not been dismissed before he testified, is not sustainable. Those counts were dismissed pursuant to the plea bargain.

Appellant's contention to the effect that the court erred in not advising him of his rights, when he testified at the Silverton trial, is not sustainable.

During oral argument, appellant asserted that, by reason of the opinion in People v. Silverton, 71 Cal. App.3d 790 [in the Advance Sheets], a reversal of the conviction of appellant herein [Wilkes] is required.

Also at the oral argument, this court granted respondent's (prosecution's) request for permission to file a Supplemental Brief in order to discuss the Silverton case referred to by appellant. Appellant was granted permission to file a Supplemental Brief in reply to the respondent's Supplemental Brief.

An issue raised in the Silverton case (by appellant Silverton) was to the effect that section 1310 of the Health and Safety Code (under which Silverton was charged

in count IX) "having been repealed," the indictment of Silverton for violating that section should be quashed. (Appellant Wilkes, in the present appeal, was a co-defendant of Silverton in that indictment.)

Since the time of oral argument (and after respondent had filed the Supplemental Brief), the Supreme Court ordered that the opinion in the Silverton case not be published.

The prosecution of appellant Wilkes for violation of former section 1310 of the Health and Safety Code (maintaining homefinding agency [placing children for adoption] without license) was commenced before the effective date of that section on January 1, 1974. That section was reenacted substantially in section 1508 of the Health and Safety Code which became effective on the same date the repeal of former section 1310 became effective (January 1, 1974).

In the course of consolidating statutes by enacting the new California Community Care Facilities Act (which includes sections 1500 et seq. of Health and Safety Code), several sections of the Health and Safety Code were repealed, including former section 1310 and former section 1250 (which defined "Facility" and "Home finding agencies").

In appellant's Supplemental Brief he states that when a criminal statute is repealed before conviction under that statute becomes final, prosecution under such statute may not continue (citing People v. Estrada, 63 Cal. 2d 740). He also states that a convicted defendant may not be punished for activity which has been legalized, after rendition of judgment, and before the judgment becomes final (citing People v. Rossi, 18 Cal.3d 295).

Appellant Wilkes states further in his Supplemental Brief that the repeal of sections 1310 et seq. of the Health and Safety Code is a bar to the indictment and the plea of guilty (by Wilkes) to count 1 of the indictment. He also states that the enactment of new section 1508 (which enacted substantially provisions of former section 1310) did not "save" the provisions of former section 1310 -- under provisions of section 9608 of the Government Code (which is to effect that termination of law creating a criminal offense does not constitute a bar to indictment for act already committed, unless intention to bar is expressly declared).

Appellant Wilkes also states that with the repeal of section 1310, sections 1500 et seq. and section 1253 of the Health and Safety Code were enacted, but only some of the sections of the repealed statutes were incorporated in

the new sections; that no provision relating to "Home Finding Agency" was incorporated in the new sections; that the Legislature intended that the specific activity outlined in former section 1310 be legalized; and that the Legislature made no provision for penalty for unlicensed "Home Finding."

Respondent's Supplemental Brief correctly states that in the course of codifying the new California Community Care Facilities Act, the provisions of former section 1310 of the Health and Safety Code were transferred to the new act along with a duplication of the punishment provisions of former section 1350.

Respondent also correctly states that as part of the consolidation of statutes into the new act, the home-finding provisions of former section 1310 were simultaneously repealed and then reenacted and transferred from Division 2, chapter 2, to Division 2, chapter 3, of the Health and Safety Code -- that the legislative bill which repealed section 1310, and the bill which enacted the California Community Care Facilities Act bear consecutive chapter numbers (i.e., Nos. 1202 and 1203, respectively), and both statutes became effective on January 1, 1974.

Former section 1310, under which appellant was

prosecuted, provided in part: "No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter . . . ."

The word "facility," as used in that section, was defined in former section 1250(a) as " . . . any hospital . . . homefinding agencies . . . ." The words "homefinding agencies" were defined in former section 1250(d) as " . . . persons engaged in finding homes for children under 16 years of age, or placing such children in any home or other place either for temporary or permanent care or adoption." (Section 1250, just referred to, was repealed by the same legislation that repealed section 1310.)

The new section 1508, which is in the Community Care Facilities Act, provides in part: "No person, firm, partnership, association, or corporation within the state shall operate, establish, manage, conduct, or maintain a community care facility in this state, without first obtaining a license therefor as provided in this chapter."

The words "community care facility," as used in new section 1508, are defined in new section 1502 as

including any facility, place or building which is maintained and operated to provide homefinding agencies for children, adults or children and adults.

New section 1502 defines "homefinding agency" as "any individual or organization engaged in finding homes or other places of placement of persons of any age for temporary or permanent care or adoption." (Stats. 1973, ch. 1203, § 4, pp. 2582-2583.)

The saving clause of Government Code section 9608 (hereinabove referred to) provides: "The termination or suspension (by whatever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law."

Former section 1350 (which was repealed by same legislation that repealed section 1310) provided that punishment for violation of former section 1310 was a fine not exceeding $500 or by imprisonment in county jail not to exceed 180 days or by both such fine and imprisonment. New section 1540 (enacted by same legislation that enacted

the comprehensive new act) provided for same punishment for violation of new section 1508 as that provided in former section 1350.

It thus appears from comparison of former sections and new sections, above referred to, that the provisions of former section 1310 were reenacted substantially in new section 1508. The repealing statutes and the enacting statutes, as to the same general subject matter, became effective on the same date. The Legislature has not indicated an intent to decriminalize unlicensed homefinding activities or to lessen punishment therefor.

In In re Dapper, 71 Cal.2d 184 [77 Cal.Rptr. 897, 454 P.2d 905], the petitioner for a writ of habeas corpus made a contention similar to the contention of appellant in the present case. In ruling against the petitioner therein, the court said (p. 189): "'When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification

of statutes, because, obviously, in such event the intent of the Legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.'"

In the present case, before such repeal and enactment, appellant herein had been convicted (by pleading guilty) of conspiring to commit misdemeanors, including violation of former section 1310.

Appellant's contention that the repeal of sections 1310 et seq. of the Health and Safety Code is a bar to the indictment and plea of guilty is not sustainable.

The judgment (order granting probation) is affirmed

WOOD, P.J.

We concur:

THOMPSON, J.

HANSON, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 16 1978

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 27380

People

vs.

Wilkes

Respectfully,

G. E. BISHEL
Clerk

50487-877 4-77 3M OSP

APPENDIX B

STATUTES OF CALIFORNIA

Article 4. Application of Chapter

1310. No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

No person shall receive or care for persons not related to him by blood or affinity within the second degree without first obtaining a license therefor as provided in this chapter.

APPENDIX C

STATUTES OF CALIFORNIA

CHAPTER 1202

An act to add Chapter 2 (commencing with Section 1250) to Division 2 of, and to repeal Chapter 2 (commencing with Section 1250) of Division 2 of, the Health and Safety Code, to amend Sections 16300 and 16312 of the Welfare and Institutions Code, and to amend Section 19 of Chapter 1148 of the Statutes of 1972, relating to health.

[Approved by Governor October 2, 1973. Filed with Secretary of State October 2, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code, as added by Chapter 1148 of the Statutes of 1972, is repealed.

SECTION 2. Chapter 2 (commencing with Section 1250) is added to Division 2 of the Health and Safety Code, to read:

APPENDIX D

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX E

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

§ 9 [cl 3] No Bill of Attainder or ex post facto Law shall be passed.

§ 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

APPENDIX G

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,	) 2 Crim. No. 28211
	) (Super Ct. No.
Plaintiff and	) A308468)
Respondent,	)
v.	)Court of Appeal
	)Second Dist.
RONALD R. SILVERTON,	) FILED
	) Jul 15 1977
Defendant and	) Clay Robbins, Jr.
Appellant.	) Clerk
----------	)
In re	) Deputy Clerk
RONALD R. SILVERTON	) 2 Crim. No. 30496
	) (Super. Ct. No.
on Habeas Corpus.	) A308468)
	)

APPEAL from a judgment of the Superior Court of Los Angeles County; petition for writ of habeas corpus. Thomas T. Johnson, Judge. Judgment affirmed in part; reversed in part; writ denied.

Ronald R. Silverton, in pro. per., for Defendant and Appellant.

APPENDIX H

In his reply brief, defendant asserts that Health & Saf. Code § 1310, having been repealed, his indictment for violating Health & Saf. Code § 1310 must be quashed. Defendant relies upon In re Estrada, 63 Cal. 2d 740 (1965) and People v. Rossi, 18 Cal. 3d 295
(Page 11.)
(1976). In Estrada, supra, 63 Cal. 2d at pp. 746-747, it is said that: "It is the rule at common law and in this state that when the old law in effect when the act is committed is repealed, and there is no saving clause, all prosecutions not reduced to final judgment are barred." And, in Rossi, supra, 18 Cal. 3d at p. 300, it is observed that: "As the United States Supreme Court has observed, it is 'the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.' (Bell v. Maryland (1964) 378 U.S. 226, 230 [12 L. Ed. 2d 822, 826, 84 S. Ct. 1814].) In the instant case, this 'universal common-law rule' mandates the reversal of defendant's conviction."

We agree with defendant on this point and, accordingly, we must reverse his conviction of count IX.

In our case, since count I (conspiracy)
(Page 12.)
mentioned the acts barred by Health & Saf. Code § 1310 his conviction of count I must, also, be reversed.

ORDER DUE
September 13, 1977

ORDER DENYING HEARING
AFTER JUDGEMENT BY THE COURT OF APPEAL

2nd District, Division 4, Crim. No. 28211
Crim. No. 30496

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE

v.

SILVERTON

IN RE SILVERTON ON HABEAS CORPUS

SUPREME COURT
FILED
SEP 8 1977
G. E. BISHEL, Clerk

Petitions for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled cause which was filed July 15, 1977 and appears in 71 Cal. App. 3d 790. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

BIRD
Chief Justice

APPENDIX I

DAVID SILVERTON, ESQ.
3600 Wilshire Boulevard
Suite 220
Los Angeles, CA 90010
213/381-7511

Attorney for Petitioner (appellant/defendant)

2d CRIM. 27380

MAR 17 1978
Received for filing in
Clerk's Office
Court of Appeal
Second Appellate District

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Respondent, vs. WAYMAN O. WILKES, Defendant, Appellant.	NO. 2d CRIM. 27380 (Super.Ct. No. A 308468)

NOTICE OF PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

I

NOTICE IS HEREBY GIVEN that WAYMAN O. WILKES, the defendant/appellant above named, hereby petitions to the Supreme Court of the United States for a writ of certiorari to review the final order of the Court of Appeal of the State of California, Second Appellate District, Division One, filed on November 18, 1977, affirming the judgment of conviction and sentence of the Superior Court

APPENDIX J

of the State of California in and for the County of Los Angeles.

This appeal is taken pursuant to 28 U.S.C. Section 1257(3).

Appellant was convicted of the crime of conspiracy to commit various misdemeanors as charged in a modified Count One. Proceedings were suspended and appellant was granted probation for a period of three years on condition that he spend the first nine months in the County Jail, and is presently enlarged on a bail.

II

The Clerk, upon the request of the United States Supreme Court, will please prepare a transcript of the record in this cause to transmit to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record in the California Court of Appeal, Second Appellate District, Division One, including this "Notice of Petition for Writ of Certiorari," and the opinion and judgment of said Court.

III

Folbwing are questions which are presented by this petition for writ of certiorari:

(1) Whether petitioner's (appellant/defendant) rights under the Fifth and Sixth Amendments to the United States Constitution as applied to the states by the Fourteenth Amendment to the United States Constitution, were infringed upon.

(2) Whether the conviction of petitioner (appellant/defendant) was the result of an application of a retrospective criminal statute, viz.: an Ex Post Facto law, as prohibited by the Federal Constitution in Article I, Sections 9 and 10.

/S/ Original Signed

DAVID SILVERTON
Attorney for Petitioner
(Appellant/Defendant)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, JEWELL HORRID, depose and say that I am over the age of 18 years and not a party to the within action; my business address is 3600 Wilshire Boulevard, Suite 220, Los Angeles, California 90010.

That on the 17th day of March, 1978, all parties required to be served have been served. On said date I served a copy of the foregoing notice of petition for a writ of certiorari to the Supreme Court of the United States on the STATE OF CALIFORNIA, appellee, by delivering the same to the receiptionist at the Office of The California Attorney General, Counsel of Record for said STATE OF CALIFORNIA, located at 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010.

Jewell Horrid
JEWELL HORRID

Subscribed and sworn to before me this 17th day of March, 1978.

Donnalee H. Smith
Notary Public in and for said County and State

OFFICIAL SEAL
DONNALEE H. SMITH
NOTARY PUBLIC CALIF.
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 29, 1980

A copy of the within "Notice of Petition for Writ of Certiorari to the Supreme Court of the United States" has been received by the undersigned, as authorized by the STATE OF CALIFORNIA Attorney General.

H. C. Horrid

OFFICE OF THE ATTORNEY GENERAL
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, CA 90010

DATED: MARCH 17, 1978

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE FRANCIS C. WHELAN, JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 4772-Criminal
WAYMAN OTIS WILKES, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, May 9, 1978

BARBARA BROSNAN, CSR
Official Reporter
412 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: 680-1089

APPENDIX K

APPEARANCES:

For the Plaintiff:

Andrea Sheridan Ordin
United States Attorney

JAMES BRENDAN O'NEILL
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For the Defendant:

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Los Angeles, California 90067

I N D E X

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LOS ANGELES, CALIFORNIA, TUESDAY, MAY 9, 1978, 1:30 P.M.

--oOo--

THE CLERK: No. 19 on the calendar, 4772-Criminal, United States of America versus Wayman Otis Wilkes.

MR. O'NEILL: Good afternoon, your Honor. James Brendan O'Neill on behalf of the United States.

MR. ROSEN: Yes, the defendant is present, your Honor. Frank P. Rosen on behalf of the defendant.

I am sorry to represent to the Court once again that this matter, the state matter has not yet reached its final disposition, your Honor.

THE COURT: Wait just a minute. Why hasn't it? It says in my information that the Supreme Court on February 17th --

MR. ROSEN: It was February 16th, your Honor. They denied a hearing. However, through counsel other than myself Mr. Wilkes has filed or, rather, applied for writ of certiorari to the United States Supreme Court.

THE COURT: On what ground?

MR. ROSEN: Constitutional grounds, Fourth, Fifth and --

THE COURT: I understand, but on what ground?

MR. ROSEN: One ground is that the statute of which he was convicted was an ex post facto law.

The other grounds are -- I don't know if your Honor is familiar with the facts of the State Court trial below. That was, that Mr. Wilkes had entered into a plea bargaining with the district attorney's office in that matter and entered a plea of guilty to Count One. At that time, when he entered his plea, the Court indicated to Mr. Wilkes, among other things, that he was to cooperate fully with the district attorney's office if they were to require or request he be called as a witness against the co-defendant in that matter, Mr. Silverton.

At the time, approximately three weeks later when Mr. Wilkes was called to and did testify, it was our contention at the State Appellate level, and it remains the contention of the defendant at the U.S. Supreme Court level, that he should have been advised of his constitutional rights not to incriminate himself and of his right to counsel before he took the stand and testified. That seems to be an issue.

THE COURT: Are there cases that hold that he had to be?

MR. ROSEN: It seems to be a new issue, your Honor. I don't know of any cases. No, that is why we are applying for certiorari.

THE COURT: Wait just a minute. He had already pleaded?

MR. ROSEN: Yes, but he hadn't been sentenced.

THE COURT: All right. So what of it? What has that got to do with the effectiveness of his plea?

MR. ROSEN: For various reasons, and I am trying to refresh my recollection now from the briefs that I filed quite some time ago.

As I raised the issue in the briefs before the Appellate Court I contended that, number one, the matter not having been finalized -- that is, he not having been sentenced and there was a lid placed on the matter, I believe, of one year by the Superior Court in the plea bargaining -- it was my contention that he could get nothing or that he could get the maximum of the lid within the plea bargaining, and that one-year period still placed him in jeopardy. There are some other facts involved.

The Court accused him of lying when he was taking the stand, inferred that he would take it into consideration when he was sentencing him and what have you.

The other aspect of that particular constitutional issue was that there were, I believe, and my recollection may be off without referring to the file, there were 17 counts filed against Mr. Wilkes. None yet had been dismissed. Therefore, he was in jeopardy of the other 17 counts.

THE COURT: That would be a defense to those other 17 counts but not as to the one to which he pleaded guilty.

MR. ROSEN: I can't disagree with your Honor. The Supreme Court of the State of California has agreed. But what we contend is it is a constitutional issue that has not yet been decided and, of course, your Honor knows how many cases the Supreme Court will accept. It is a minute amount. We will know within, I'd say, 90 days to 120 days whether or not they will accept the application for certiorari. I don't know at this time. All I can tell the Court are the facts.

As I say, I do not represent Mr. Wilkes in his application for the writ of certiorari before the Supreme Court. I do know of my own personal knowledge that a request for a transcript and a notice of the application has been filed with the Supreme Court of the State of California.

THE COURT: Has been filed with it?

MR. ROSEN: Yes.

THE COURT: All right.

MR. ROSEN: I was informed by other counsel that either today or tomorrow the application will be filed to the Supreme Court, with the clerk of the Supreme Court.

THE COURT: The application for leave to file?

MR. ROSEN: Yes.

MR. O'NEILL: Your Honor, at issue here is the validity of the defendant's plea in the State Court to the state crime while he was on federal probation.

It appears that the matters defense counsel is raising in his petition for writ of certiorari are matters affecting the defendant's sentencing in the State Court. That sentencing occurred after the plea was knowingly and voluntarily entered into. It is the plea to that crime in the State Court that is the subject of the petition for revocation of probation.

At issue is the validity of that plea as it pertains to this defendant and possible revocation of his federal probation.

I have before me, your Honor, a trascript of that plea that occurred in Department 133 on February 18, 1975. I think some pertinent passages should be brought to the attention of the Court, if I may read from portions of the transcript.

THE COURT: Read them.

MR. O'NEILL: (Reading:)

"Wayman Otis Wilkes, to Count One of the indictment of a certain number which charges you with a violation of conspiracy to commit a

crime in violation of Section 182(1) of the Penal Code, how do you know plead; guilty or not guilty?

"The defendant: Guilty."

There is some more conversation and then the Court advises the defendant:

"If either side chooses to call you as a witness in the matter you must cooperate in a reasonable and truthful manner with either side in this case.

"The defendant: I will."

Then the deputy district attorney advises the defendant of some more rights.

"Two additional waivers, your Honor, please. Mr. Wilkes, you understand that while the Court is limited to one year in the County Jail initially as a condition of probation, if you violate that probation you could be sentenced up to the State Prison for the term proscribed by law, and that term proscribed by law in this case, the one you have pled guilty to, the conspiracy charge, would be from one to three years. Do you understand that?

"The defendant: Yes."

"I understand you are on federal parole.

"The defendant: Probation."

Then the deputy D.A. says:

"This matter has no bearing or effect one way or the other on your federal probation. They might choose to violate you. They might not, but that is a decision they make independently of what this Court does. Do you understand that?

"The defendant: Yes."

Then the Court concludes by instructing the defendant to check with his probation officer.

So I think that part of the transcript highlights that the defendant was aware that his plea in State Court had been entered and it would have a bearing on his federal probation, that any plea agreement made in connection with that particular case would not have effect on his federal probation and whether or not that federal probation was violated.

THE COURT: I don't think I heard counsel for the defendant contend about that.

MR. ROSEN: No, no, I don't contend at all. I am only concerned with this Court's attitude of not wishing to have a probation hearing, from my past experience, until the matter is finalized.

May I just respond briefly to what counsel said.

THE COURT: I think it is finalized for all practical purposes and for all legal purposes.

MR. ROSEN: Except that let's assume that certiorari is granted. The result would be that he could --

THE COURT: Supposing it is. Then you can come in and ask me to vacate that sentence, the sentence that I am now going to impose. If it is done within 120 days I have the power to vacate it for further sentencing.

MR. ROSEN: Of course, there is a practical matter. If the Court does sentence Mr. Wilkes to time, then the practicality, Mr. Wilkes went through this once before through an error in the Appellate Court by prior counsel or the clerk or something, and his appeal bond was --

THE COURT: I can't see any legal merit to his application for certiorari.

MR. ROSEN: Except, though, your Honor, if the Court does grant certiorari -- this, I wanted to respond to counsel -- it would not necessarily go to the issue of the sentencing. It would go to whether or not he could withdraw his plea.

Counsel read a portion of the transcript and I don't have it with me, but there is a portion in the trial transcript when he was testifying that he indicated

to the Court under oath that he did not understand or was he aware of the consequences of his plea at the time. This is one of the times when the Court indicated --

THE COURT: All right. That is a self-serving statement.

MR. ROSEN: I understand that. But it was our contention throughout the appellate level in the State Court that the plea should be set aside because of the violation, and I believe that if certiorari were granted that would be the result before the Supreme Court because there is a constitutional issue. As I say, it's never been decided.

THE COURT: What is it? After he enters a voluntary plea of guilty then what is the constitutional issue thereafter?

MR. ROSEN: Whether or not before sentencing and before additional counts which have not been dismissed have been dismissed, should he be allowed to testify against himself or testify at all concerning the facts out of which that matter arose without first being advised of his right not to and, second, being advised of his right to have counsel present if and when he does.

THE COURT: You have some authorities to that effect?

MR. ROSEN: If I did perhaps we would have been

successful before the Supreme Court. I have only analagous authorities.

THE COURT: I don't consider that that is any valid, legal cause at all. If you turn out to be right, why, then, you can make a motion.

Now, let's see. Arraign him right now.

THE CLERK: He has been arraigned, your Honor, but he hasn't admitted or denied.

Mr. Wilkes, on February 8, 1976, the probation officer filed a petition for an order to show cause why the probationary order of February 19, 1970 should not be revoked. That petition alleges that you have violated the terms and conditions of probation, to wit:

On February 18, 1975, in California Superior Court Case No. A308468 the probationer pleaded guilty to Section 182.1 P.C., conspiracy to commit 224(p) Civil Code, 22(h) Civil Code, in violation of Health Safety Code Section 1310, 1350, 1508 and 1540, and also Section 273(a) of the Penal Code. All crimes were deemed to be misdemeanors.

Mr. Wilkes, do you admit or deny that you have violated the terms and conditions of probation as alleged by the probation officer?

MR. ROSEN: Your Honor, at this time, before there is an admission or denial, I believe that the probation has terminated. I may be wrong, but I think that

it was a period that has since passed and I don't believe --

THE COURT: You say that it has what?

MR. ROSEN: I think that probation has terminated for which --

THE COURT: No, it hasn't. The period of probation was to commence after he finished his sentence of imprisonment.

MR. ROSEN: I believe that was more than four years ago, your Honor.

THE COURT: Why don't we talk about five instead of four or three.

MR. ROSEN: Your Honor, according to the order that I have it is four years and it commences on the 19th of February, 1970.

THE COURT: How could it? Wasn't he on bail pending his appeal?

MR. ROSEN: The appeal in the State Court?

THE COURT: He took an appeal.

MR. ROSEN: I don't know about the appeal in the Federal Court, your Honor.

THE COURT: Well, you should. I am just telling you that if it ended -- The period of probation did not start to run until at the very -- if there was no stay, then it didn't start to run until February 19th, 1974.

MR. ROSEN: It is our understanding that it started April the 19th, 1973, your Honor.

THE COURT: How did you get that idea?

MR. ROSEN: This is what the defendant advises me.

THE COURT: I don't care what he advises you.

MR. O'NEILL: Your Honor, may I be of some assistance.

THE COURT: Well, if you know what you are talking about, but otherwise, don't bother me.

MR. O'NEILL: Yes, your Honor. I have some facts from the files in the case and from the probation officer.

The probation officer has advised me that this defendant got out of prison on his federal conviction on July 21st, 1972.

THE COURT: Well, just a minute. All right. Have you ever heard that the sentence hasn't been completed until the parole time is over?

MR. O'NEILL: Yes, your Honor. That expired on April 21st, 1973, parole expired. My understanding is it was a five-year parole term and, therefore, that would end on April the 21st, 1978.

THE COURT: Are you talking knowingly or not, or are you taking it from the probation officer? How could

he serve a sentence for four years and be out?

MR. ROSEN: There was time off for good time, your Honor.

THE COURT: All right, time off for good time. How much?

MR. O'NEILL: Your Honor, I know that the probation presentence report indicates that he was in custody for 167 days before the time he was sentenced. I assume that that time was credited toward the four-year sentence which he received.

THE COURT: Why don't you find out. I don't recall that he was in custody.

MR. O'NEILL: The presentence report dated --

THE COURT: Let me see it.

MR. O'NEILL: -- dated February 19th, 1970 so indicates, your Honor. May I approach the clerk?

THE COURT: I can read as well as can you.

(Document handed to the Court.)

THE COURT: Furthermore, did you ever give -- listen, don't be taking your advice from a probation officer.

Did you give any consideration to the fact that the petition for revocation was filed in 1976? Did you?

MR. O'NEILL: Yes, your Honor.

THE COURT: Do you know what the rule is?

MR. O'NEILL: Yes, your Honor. If the violation occurs during the term of probation, even though he is brought into court after the probation has expired --

THE COURT: No, if the warrant was issued in 1976.

MR. ROSEN: If your Honor recalls at the last hearing, counsel could not be present. I was not available to call that to the attention of the Court when the Court continued it.

THE COURT: I am just telling you that the petition, even according to your theory, the petition was filed and the Court ordered the petition to go forward in 1976. May I see a copy of the petition and then I want this file found.

I will keep this case until I get the file. I want to find out when the man was here in court. According to this record, he should have been here in court on February 19th, 1976. Even according to your theory, that was well within the period of probation. All right. Call the other case.

I am going to ask. I want to see a copy of the complaint showing the date of the -- a copy of the indictment. Do you have one, Mr. O'Neill?

MR. O'NEILL: A copy of the indictment, your Honor?

THE COURT: Yes.

MR. O'NEILL: Yes, I have one.

THE COURT: Showing the date it was filed. You say he was released in February of 1972 from prison? He was released from prison when?

MR. ROSEN: I believe July, your Honor.

MR. O'NEILL: July 21st, 1972, your Honor. We have a document showing his mandatory release, Parole Form I-13.

THE COURT: February 23rd?

MR. ROSEN: July.

MR. O'NEILL: July 21st, 1972, your Honor.

THE COURT: 1972?

MR. O'NEILL: Yes.

THE COURT: All right. Well, the law is very clear, most clear, that the petition must issue during the period of probation in order to make it valid, and that he be in court during the period of probation. He has been coming in here to court for a long time. So we won't bother about it any further.

MR. ROSEN: My records indicate that the first appearance in court was July 12th, 1976. I believe there was an appearance from Mr. Wilkes prior to that by counsel, he being incarcerated in the state institution. He was incarcerated at the time of the first hearing, your

Honor, and did not appear except through counsel.

My records, and they may be erroneous because I wasn't representing him at that time, my records indicate that his first appearance was July 12th.

THE COURT: What was the date he was released?

MR. ROSEN: July 17, 1972.

THE COURT: All right. So he was in court on this charge within the five-year period. All right. Did he either admit or deny?

THE CLERK: Neither one. He never answered.

THE COURT: All right. Then it is deemed that he denied it. The matter will be set for trial unless you have a certified copy --

MR. ROSEN: Excuse me. We are prepared to admit at this time, your Honor.

THE COURT: Very well.

MR. ROSEN: The question hadn't been completed. I interrupted the clerk and I am sorry.

THE COURT: All right.

THE CLERK: Mr. Wilkes, do you now admit or deny that you have violated the terms and conditions of probation as alleged by the probation officer?

THE DEFENDANT: Yes.

MR. ROSEN: Do you admit?

THE DEFENDANT: Yes, I do. I admit.

THE COURT: By the way, that mandatory release too, that doesn't end parole.

MR. ROSEN: I understand.

THE COURT: In other words, parole means the end of the sentence.

Is there anything that you have to say, Mr. Wilkes, before sentence is pronounced?

MR. ROSEN: May I speak on behalf of the defendant first.

THE COURT: He has the right to do so first.

MR. ROSEN: I understand, your Honor. Do you have anything that you want to say to the Court?

THE DEFENDANT: Well, your Honor, I didn't believe at the time this act was committed that it was anything illegal about it. And all I did was recommend an ex-niece of mine to an attorney who was in the adoption practice and that's the extent of my involvement.

THE COURT: According to the probation report there were two women involved.

THE DEFENDANT: No, your Honor,there was only one. Her name was Cathy Brown.

THE COURT: What was her name?

THE DEFENDANT: Cathy Brown.

THE COURT: WAs there some woman living in your home at about that same time?

THE DEFENDANT: No, your Honor. No, there was not, your Honor.

THE COURT: Well, you don't have to answer these questions unless you are -- you don't have to answer any questions the answer to which might tend to incriminate you. So I advise you that you don't have to answer my question. Did you know a Rosemary Henry?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you introduce her -- you don't have to answer these questions.

MR. ROSEN: He is prepared to answer the questions about that issue of the state.

THE COURT: Did you refer Rosemary Henry to Mr. Silverton?

THE DEFENDANT: No, I did not, your Honor.

THE COURT: Do you know if she talked to Mr. Silverton?

THE DEFENDANT: I understand she did, your Honor.

THE COURT: Did you suggest to her that she talk to Silverton?

THE DEFENDANT: I beg your pardon, your Honor.

THE COURT: Did you suggest --

THE DEFENDANT: No, your Honor, I did not. I didn't know that she had talked to him. I did not even

know that she had talked to him.

THE COURT: Well, anything further that you wish to say?

THE DEFENDANT: Well, all I can say is, your Honor, I am sorry that this all came about and I had no intention of violating any laws. That would have been foolish, being on probation, to even think about violating the law. And I didn't think that an attorney would be doing anything illegal. I don't think it's been decided yet whether --

THE COURT: Did you use cards, calling cards that referred to you as a doctor?

THE DEFENDANT: I think Mr. Silverton handed out some cards. He wanted me to tell my doctor friends about his practice. That is the extent of it.

THE COURT: You never had any cards printed with your name on it and calling you a doctor?

THE DEFENDANT: Mr. Silverton, I think, had some identical cards to his printed, yes, with my name on it.

THE COURT: You knew he had them, didn't you?

THE DEFENDANT: Yes.

THE COURT: You knew that he was going to use them, didn't you?

THE DEFENDANT: I didn't sanction it.

THE COURT: What did you tell him about not using it?

THE DEFENDANT: I didn't discuss it with him. I did not discuss it with him, your Honor.

THE COURT: Do you have anything further to say?

THE DEFENDANT: That is all, your Honor.

THE COURT: Do you have anything to say in his behalf, Mr. Rosen?

MR. ROSEN: Yes, your Honor, a few points that I should like to call to the attention of the Court. I realize that they may be self-serving but they are circumstances that I think the Court should be aware of.

As your Honor is probably aware, I did not represent Mr. Wilkes in the matter below. There were --

THE COURT: You mean at the original one where he pleaded?

MR. ROSEN: At the trial level, yes, your Honor.

THE COURT: I mean where he pleaded guilty?

MR. ROSEN: That's correct. It is my understanding -- First of all, let me call to the Court's attention a matter that happened. When I was called into the case to handle the appeal I was the third attorney. The first attorney had filed a notice of appeal. This is just one example that I want to call to the attention of the

Court. He had filed a notice of appeal in Mr. Wilkes' name in pro per with the attorney's address on it in the upper left-hand corner. That attorney had moved his office subsequent to that notice being filed and had not left a forwarding address.

Mr. Wilkes was out on an appeal bond at that time. The transcripts not having reached Mr. Wilkes nor his attorney by the clerk, the necessary documents not having been filed, that matter was dismissed.

THE COURT: Of course, I know that because when I first saw you in this matter I was told.

MR. ROSEN: I wasn't sure the Court was aware of it.

THE COURT: I remember, but he did get the right to appeal.

MR. ROSEN: After serving eight and a half months. He served eight and a half months of his nine-months sentence that the Court had imposed.

What I am trying to bring out to the Court, the attorney below, when I read these transcripts, I was convinced that perhaps the matter wasn't handled properly. However, I did not believe that there were enough facts before me in the transcripts to allege one of the grounds as incompetence of counsel.

As your Honor has heard and is aware, the plea

was entered, according to Mr. Wilkes' testimony or statements before the Court, freely and voluntarily. Mr. Wilkes has told me that he didn't really understand what was going on at the time. I have found out from Mr. Wilkes and other people that the attorney advised him below that it was going to be a matter of three or four weeks in court. It would cost Mr. Wilkes in excess of an additional $10,000. He suggested to him at that time that he enter his plea because it would be much more reasonable for him and he didn't have the time to try the matter.

Mr. Wilkes, with this advice -- and by the way, the attorney was provided by the co-defendant, Mr. Silverton. I am only calling these facts to the Court's attention to mitigate these circumstances.

THE COURT: Well, if he was being provided by Mr. Silverton, what difference does it matter.

MR. ROSEN: He didn't pay for it. He recommended. Mr. Wilkes did not know who to go to.

THE COURT: Who was his attorney?

MR. ROSEN: Dobbs. What was his first name?

THE DEFENDANT: Steven.

MR. ROSEN: Steven Dobbs.

Of course, the plea was entered and the matter is all behind us now, but it is just one of many circumstances.

Mr. Wilkes was out on an appeal bond and still had to serve eight months and some days of his sentence.

Later, when it was finally dismissed -- rather, when the dismissal was reversed, then he got out.

I also want to call to the attention of the Court that he still had, I believe, if good time were taken into consideration, 17 days left on his sentence. How many?

THE DEFENDANT: Nine.

MR. ROSEN: Nine days. I believe it was 17. Mr. Wilkes says it was nine.

We appeared on the remittitur when the Supreme Court in the State Court denied the appeal and the Court in that matter suspended the sentence and terminated the probation. That was approximately two months ago.

I think in this particular matter, your Honor, Mr. Wilkes got involved with Mr. Silverton. Perhaps there were some things that he should have been aware of that he wasn't. But irrespective of that, I think that the sentence that he has served, some eight and a half months, and I don't believe, your Honor, that it would have been that sentence. I think it would have been probably straight probation in the State Court except that Mr. Wilkes did not handle himself properly when he testified on behalf of the People in the trial against Mr. Silverton.

The Court, there are many instances and many direct quotes by the Court that he didn't believe Mr. Wilkes and it could affect his sentencing. Mr. Wilkes asked him at that time, "Do you think I should get an attorney?" And he said, "No, you don't need an attorney."

I was quite appalled when I read that portion of the transcript, with all due respect to the trial court. I understood his position at the time but it seemed like Mr. --

THE COURT: I don't recall any Supreme Court of the United States ruling to the effect that when a witness gets on the stand he must be advised by the Court of his right to remain silent.

MR. ROSEN: I agree, your Honor, that there are no cases. I couldn't find any. But I think it is an issue that perhaps might be decided by the Supreme Court.

Basically, the rule is that if a defendant is still in jeopardy, and there have been -- I can't recall the cases now. It's been a while since I was involved in the cases.

THE COURT: He can still voluntarily testify.

MR. ROSEN: But in any event, I am only calling that to the attention of the Court now to show the series of circumstances.

I believe Mr. Wilkes has suffered quite

immensely as a result of this. It's cost him quite a large sum for attorney fees to now four different attorneys. He did spent eight and a half months in the County Jail and up until a month and a half ago he was still on probation to the State Court.

THE COURT: Any legal reason why sentence should not now be rendered?

MR. ROSEN: No, your Honor.

THE COURT: Any legal reason to show why judgment should not now be rendered?

MR. ROSEN: There is none, your Honor.

THE COURT: All right. The Court finds from the admission of the defendant that he has violated the terms of probation. The Court now revokes the probationary order imposed as to Counts Three and Four and the Court reduces the period of sentence of the defendant on Counts Three and Four from five years to 15 months.

It is ordered, adjudged and decreed that the defendant is committed to the custody of the United States Attorney General or his authorized representative on Counts Three and Four for a period of 15 months.

Sentences on Counts Three and Four are to run concurrently with and not consecutively to each other.

Does he want a few days?

MR. ROSEN: Yes. Could we have a stay on that,

your Honor.

THE COURT: How long?

MR. ROSEN: I would think that it would take approximately three weeks for him to get his affairs in order. Your Honor knows that he has been --

THE COURT: What business is he in?

MR. ROSEN: He is working for a medical clinic, for a medical group that have numerous clinics throughout the country. He is an administrator.

THE COURT: Why isn't two weeks enough?

MR. ROSEN: I think it would probably take more than three weeks, your Honor, to get his affairs in order. The medical group relies on Dr. Wilkes. He has to change the systems around and have somebody trained to replace him to know all of these matters that are involved. He has personal matters with his family that he has to take care of.

THE COURT: Just a minute. Will you read me counsel's last statement.

(Record read.)

THE COURT: Did you hear what I was hearing?

MR. ROSEN: I realize that, your Honor. That is a slip of the tongue. I know that he is not a doctor but I have --

THE COURT: I know, but he's been holding himself

out to be.

MR. ROSEN: Not to me, not to me, your Honor. I get telephone messages and the messages say "Mr. Wilkes." I have been through this --

THE COURT: I am not saying known to you as but known to others as.

MR. ROSEN: I don't believe that is true. I believe I picked this up from the transcripts, your Honor.

THE COURT: His sentence is stayed, the execution of sentence is stayed until 11:00 o'clock a.m. on Tuesday, May 23rd.

The defendant is ordered to surrender himself on or before that date and that time to the United States Marshal on the Main Street floor of this building. Very well.

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 4772-Criminal
WAYMAN OTIS WILKES, Defendant.	)	

C E R T I F I C A T E

I hereby certify that I am a duly appointed, qualified and acting official reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 30 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Tuesday, May 9, 1978, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of May, 1978.

Barbara Brosnan
Official Reporter